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DISTRICT OF UTAH

BY: [Signature]

IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF UTAH

ALLEN, Weston D.,

Plaintiff,

v.

UTAH STATE PRISON; DR. RICHARD M.
 GARDEN, Medical Administrator; BARRY
 STONE; Physician Assistant; TERRY
 JEFFRIES, JR. Physician Assistant;
 KENNON G. TUBBS, M.D.; RAYMOND
 MERRILL, Physician Assistant; CARL W.
 AVERY; Registered Nurse

Defendants.

**DEFENDANTS' MOTION TO
 DISMISS, FOR SUMMARY
 JUDGMENT AND QUALIFIED
 IMMUNITY**

Case No: 03-CV-173TS

Judge: Ted Stewart

Magistrate Judge: Samuel Alba

Defendants Richard M. Garden, Barry Stone, Terry Jeffries, Kenneth G. Tubbs,
 Raymond Merrill and Carl W. Avery, through counsel, Alain C. Balmanno, Assistant Utah State
 Attorney, submit this *Motion to Dismiss, for Summary Judgment and Qualified Immunity*
 pursuant to Fed. R. Civ. P. 12(b)(1) and 56(c).

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Defendants' *Motion* is based in part on plaintiff's claim being moot. *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir.1996); *Murphy v. Hunt*, 455 U.S. 478, 481, (1982).

Further, to prove a violation of the Eighth Amendment for failure to provide medical care a prisoner must prove acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993). Plaintiff is unable to meet his burden because defendants have not been indifferent to plaintiff's medical needs.

Summary judgment is appropriate under Rule 56 (c) against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). Moreover, defendants are entitled to qualified immunity because defendants' actions did not violate a constitutional right. *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996); *Wilson v. Meeks*, 52 F.3d 1547,1552 (10th Cir. 1995).

For the reasons more fully developed in the supporting *Memorandum*, plaintiff's *Complaint* should be dismissed with prejudice.

DATED this 25th day of February, 2004.



Alain C. Balmanno
Assistant Attorney General
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS, FOR SUMMARY JUDGMENT AND QUALIFIED IMMUNITY** was served by U.S. mail this 25th day of February, 2004 to the following:

Weston David Allen
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Corina Archuleta